



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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February 23, 2021

Ryan T. Plotz
The Mitchell Law Firm, LLP
426 First St
Eureka, CA 95001

Re: Your Request for Advice
Our File No. A-21-015

Dear Mr. Plotz:

This letter responds to your request for advice regarding the conflict of interest provisions of the Political Reform Act (the “Act”) and Government Code Section 1090, et seq.¹ Please note that we are only providing advice under the Act and Section 1090, not under other general conflict of interest prohibitions such as common law conflict of interest, including Public Contract Code.

Also note that we are not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), and any advice we provide assumes your facts are complete and accurate. If this is not the case or if the facts underlying these decisions should change, you should contact us for additional advice.

We are required to forward your request regarding Section 1090 and all pertinent facts relating to the request to the Attorney General’s Office and the Humboldt County District Attorney’s Office, which we have done. (Section 1097.1(c)(3).) We did not receive a written response from either entity. (Section 1097.1(c)(4).) We are also required to advise you that, for purposes of Section 1090, the following advice “is not admissible in a criminal proceeding against any individual other than the requestor.” (See Section 1097.1(c)(5).)

QUESTIONS

1. Is Humboldt Community Services District (“District”) board member and real estate agent, Mr. Matteoli, prohibited under the Act from participating in decisions concerning the McKay Ranch development due to his source of income financial interests?

2. Does Section 1090 prohibit the District from contracting with the developer, Kramer Properties Inc., due to Mr. Matteoli’s financial interests?

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

CONCLUSIONS

1. Yes. It is reasonably foreseeable that the McKay Ranch Development decisions will have a material financial effect on his source of income interests in his broker and brokerage firm. He must recuse himself from these decisions.

2. No. Under Section 1091.5(a)(10) Mr. Matteoli's interest in the contractual decisions is deemed a "noninterest" and the District is not prohibited from contracting with the developer under Section 1090.

FACTS AS PRESENTED BY REQUESTER

The Humboldt Community Services District ("District"), provides water, wastewater, and other municipal services to an unincorporated area of Humboldt County. The District is governed by a five-person Board of Directors, elected at-large from within the District's boundaries. The Board of Directors is principally responsible for development of policy and the hiring and supervision of a General Manager, who serves as the chief executive officer of the District and is tasked with implementing the Board's policy directives. Mr. Matteoli is a newly seated member of the Board of Directors.

Mr. Matteoli is a licensed real estate salesperson and works as an independent contractor for Cutten Realty Corp., doing business as Coldwell Banker Cutten Realty ("Cutten Realty"). Cutten Realty employs approximately 22 licensed realtors, including Mr. Matteoli and the designated officer under the corporate broker's license, John Wahlund. Cutten Realty's principal office is located within the District boundaries, and it represents buyers and sellers in real estate transactions throughout the County, including properties within the District's boundaries. Mr. Matteoli is compensated by Cutten Realty solely based upon commissions payable from real estate transactions in which Mr. Matteoli, personally, represented the buyer or seller. Mr. Matteoli does not have any ownership interest in Cutten Realty. Nor does Mr. Matteoli receive any compensation from Cutten Realty from commissions or other income received from transactions in which Mr. Matteoli did not represent the buyer or the seller.

Kramer Properties, Inc., a private for profit corporation, owns approximately 66 acres of real property that is immediately adjacent to, but outside of, the District's boundaries. Kramer Properties, Inc. is in the process of a large multi-phase subdivision of its real property to include 320 residential single and multi-family units, and commonly referred to as the McKay Ranch development. As part of the development, Kramer Properties, Inc. is in negotiations with the District concerning, among other things, the following:

- Potential annexation of the McKay Ranch into the District's service boundaries,
- Extension of services, including water and wastewater, and corresponding capital improvements required, and
- Development fees and other related compensation to the District.

In a follow-up email, you note that some of the District decisions will be regulatory (like the approval of a mitigation measure for water supply impacts) and some will be contractual (like an

annexation agreement or a water and sewer services connection agreement or a main line extension agreement).

Kurt Kramer is the principal and, presumably, majority shareholder of Kramer Properties, Inc. Kurt Kramer has been the primary contact for and representative of Kramer Properties, Inc. in all discussions with the District concerning the McKay Ranch. Megan Kramer is the daughter of Kurt Kramer and a realtor with Cutten Realty in the same office as Mr. Matteoli. It is assumed that Ms. Kramer stands to obtain some or all real estate listings arising from the McKay Ranch development and subdivision based upon her familial connection to Kurt Kramer. It is also assumed that she has sold other properties held by Kramer Properties, Inc. in the past. It is unknown when any real property will be developed, listed, and sold within the McKay Ranch subdivision, although it is believed to be at least two years away based on a conservative estimate. It is also entirely unknown whether Ms. Kramer will still be a realtor with Cutten Realty or whether she will leave Cutten Realty before the residential listings within the McKay Ranch are offered for sale. In your follow-up email, you noted that based on the project proposal before the County, the 320 living units will be constructed over a 20-year planning horizon. This indicates an average of 10 to 20 homes constructed per year. The building will progress in nine phases and depend on market factors. Assuming Ms. Kramer obtains the listings and remains with Cutten Realty, the projected financial gain to the brokerage firm would depend on the number of houses sold during any given year and the sales price.

Mr. Matteoli has no promise or agreement with Kramer Properties, Inc. or any individual to obtain any listings within the McKay Ranch subdivision or other real estate holdings of Kramer Properties, Inc. or Kurt Kramer. Mr. Matteoli has never represented Kramer Properties, Inc. or Kurt Kramer in any real estate transaction. Mr. Matteoli does not own stock in Kramer Properties, Inc. In the event Ms. Kramer remains with Cutten Realty and sells properties within the McKay Ranch subdivision, Mr. Matteoli would not receive any income from Cutten Realty arising from any such transactions, unless Mr. Matteoli happens to represent the buyer in the particular transaction. Cutten Realty, however, would receive commission income from properties sold by Ms. Kramer, assuming she is still with Cutten Realty when homes are ever sold.

ANALYSIS

The Act

The Act's conflict of interest provisions prohibit any public official from making, participating in making, or otherwise using his or her official position to influence a governmental decision in which the official has a financial interest. (Section 87100.) A public official has a "financial interest" in a governmental decision, within the meaning of the Act, if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on one or more of the public official's interests. (Section 87103; Regulation 18700(a).) Relevant to these facts, Section 87103 defines a financial interest to include:

- Any source of income, aggregating \$500 or more in value provided or promised to, received by, the public official within 12 months prior to the time when the decision is made.

- Personal finances, including those of the official's immediate family. (Section 87103.)

Under Regulation 18700.1(c)(1), "commission income" means gross payments received by a public official for services rendered as a broker, agent, or other salesperson for a specific sale or similar transaction. The "source of commission" in a specific sale or transaction includes the broker and brokerage business entity under whose auspices the agent works; the person the agent represents in the transaction; and any person who receives a finder's or other referral fee for referring a party to the transaction to the broker, or who makes a referral pursuant to a contract with the broker. (Regulation 18700.1(c)(2)(C.))

Thus, the broker and brokerage business, Mr. Wahlund and Cutten Realty, individual buyers or sellers he assists in a transaction, and any referral source of the transaction to Mr. Wahlund or Cutten Realty will be sources of commission income to Mr. Matteoli, and present a potential financial conflict in a decision. No facts are presented as to sources of commission income other than Mr. Wahlund and Cutten Realty, and this analysis is limited to these two sources of income.

Foreseeability and Materiality

A conflict of interest may arise only when the reasonably foreseeable financial effect of a governmental decision on a public official's interests is material. The standard for foreseeability differs depending on whether an interest is explicitly involved in the decision. (Regulation 18701.) A financial interest is explicitly involved if it is a named party in or the subject of the decision. (Regulation 18701(a).) You confirmed by email that none of Mr. Matteoli's sources of commission income would be a named party or subject to the decisions. Where, as the facts indicate here, his financial interest in Mr. Wahlund or Cutten Realty is not explicitly involved in the decision, the financial effect is reasonably foreseeable if it can be recognized as a realistic possibility, more than hypothetical or theoretical. (Regulation 18701(b).)

The reasonably foreseeable financial effect of a governmental decision on the official's financial interest is material where the decision may result in an increase or decrease of the brokerage firm's annual gross revenues, or the value of its assets or liabilities, in an amount equal to or greater than \$1,000,000, or five percent of the entity's annual gross revenues and at least \$10,000. (Regulations 18702.1(a)(2)(A) and (B), 18702.3(a)(4).)

In light of Ms. Kramer's current employment with Cutten Realty and relationship with Kurt Kramer, you request that we assume Ms. Kramer has previously listed and sold properties on behalf of Kramer properties and will list and sell properties within the McKay Ranch development. You also ask that we assume that, if Ms. Kramer continues her employment with Cutten Realty, the decisions will meet the above standard for Mr. Wahlund and Cutten Realty. Based on the information provided, you have presented a realistic possibility that in approximately two years a fellow real estate agent at Cutten Realty will handle the real estate listings for the McKay Ranch development, to the financial benefit of Mr. Wahlund and Cutten Realty. Therefore, it is reasonably foreseeable that the District decisions regarding the McKay Ranch development will have a

material financial effect on Mr. Matteoli's source of income interests. He may not participate in these decisions and must recuse himself pursuant to Regulation 18707.²

Section 1090

The District decisions include contractual decisions, such as an annexation agreement, water and sewer services connection agreement or a main line extension agreement that the District will negotiate with the developer, Kramer Properties, Inc. These contractual decisions require a separate analysis under Section 1090. (See 78 Ops. Cal. Atty. Gen. 230 (1995) [a development agreement constitutes a contract for purposes of Section 1090]; and *Ansolabehere* Advice Letter, No. A-17-160a [discussion of land use decisions that are regulatory as opposed to contractual in nature.]

Section 1090 states, “[m]embers of the Legislature, state, county, district, judicial district, and city officers or employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members.” An officer is conclusively presumed to be involved in the making of his or her agency's contracts when the officer is a member of a board or commission that has the power to execute the contract at issue. (*Thomson, supra*, at p. 649.) Generally, when Section 1090 is applicable to one member of a governing body of a public entity, the entire governing body is precluded from entering into the contract. (*Stigall v. Taft* (1962) 58 Cal.2d 565, 569.) A contract that violates Section 1090 is void. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646.) Therefore, we must determine the nature of Mr. Matteoli's financial interest in the contract decisions under Section 1090, and if this interest would prohibit the District from contracting with the developer, Kramer Properties, Inc.

The phrase “financially interested” broadly encompasses anything that would tie a public official's fortunes to the existence of a public contract. (*Carson Redevelopment Agency v. Padilla* (2006) 140 Cal.App.4th 1323, 1335.) The prohibited financial interests may be indirect as well as direct, and may involve financial losses, or the possibility of losses, as well as the prospect of pecuniary gain. A financial interest may include a board member's prospect of future business opportunities related to the contract or his desire to maintain a favorable ongoing relationship with the contracting party. (86 Ops. Cal. Atty. Gen. 187, 189 (2003).) Where a contract directly or indirectly impacted the financial health of an official's source of income interest, even though the contract would not result in commissions to the official, the court has found a financial interest. (*Fraser-Yamor Agency, Inc. v. County of Del Norte* (1977) 68 Cal.App.3d 201, 215.) Here, Mr. Matteoli has a financial interest in his broker and brokerage firm, which stand to benefit indirectly from the contract decisions at issue.

Section 1090 is concerned with financial interests, other than “remote” or “noninterests,” that prevent public officials from exercising absolute loyalty and undivided allegiance in furthering the best interests of their agencies. (*Stigall, supra* at p. 569.) The Legislature has expressly defined certain “noninterests” that do not come within the prohibition of Section 1090. Under Section 1091.5(a)(10), an officer has a “noninterest” where he is a real estate agent of a firm that renders service to the contracting party as a real estate agent or broker, so long as the real estate agent does

² While you note that Ms. Kramer could leave the brokerage firm in the future and take this business with her, that possibility appears hypothetical at this time.

not receive remuneration or commission as a result of the contract and has an ownership interest of less than 10 percent in the real estate firm. The “noninterest” in Section 1091.5(a)(10) is defined as:

(10) That of an ... agent of a firm which renders, or has rendered, service to the contracting party in the capacity of ... real estate agent, or real estate broker, if these individuals have not received and will not receive remuneration, consideration, or a commission as a result of the contract and if these individuals have an ownership interest of less than 10 percent in the law practice or firm, stock brokerage firm, insurance firm, or real estate firm.

Mr. Matteoli does not have an ownership interest in the real estate firm. Therefore, this noninterest is applicable to these facts, to the extent that Mr. Matteoli does not receive any remuneration, consideration, or commission as a result of the development agreements between the County and Kramer Properties, Inc. Section 1090 would not prohibit his participation in the contractual decisions,³ and therefore, the District would not be prohibited from entering into these contracts under Section 1090.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Dave Bainbridge
General Counsel

L. Karen Harrison

By: L. Karen Harrison
Senior Counsel, Legal Division

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³ Please note that the Act requires his recusal from all the development decisions.